United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19731 21717

LUTHER P. MITCHELL, APPELLANT

v.

JOHN W. GARDNER, Secretary of Health, Education and Welfare, APPELLEE

Appeal from the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 20 1965

Nathan J. Paulson
CLERK

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ARNOLD T. AIKENS,
JOHN A. TERRY,
Assistant United States Attorneys.

C.A. No. 1598-64

QUESTION PRESENTED

In seeking administrative and judicial review of the action of the Secretary of Health, Education and Welfare denying his claim for disability payments under the Social Security Act, did appellant sustain his burden of proof on the issue of disability?

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

JOHN W. GARDNER, Secretary of Health, Education and Welfare, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court granting summary judgment for appellee, the Secretary of Health, Education and Welfare. Appellant in 1962 had filed an application (Exh. 1, A.R. 69-72)[1] for the estab-

[1] A certified copy of the entire administrative record, cited herein as "A.R.", was filed with the court below and is part of the record on appeal. Included therein are seventy-three exhibits consisting of all the papers before the Social Security Administration at the time of its decision, together with certain other papers submitted by appellant. The exhibits will be cited herein both by number and by the pages of the administrative record on which they appear.

lishment of a period of disability and for disability insurance benefit payments under §§ 216(i) and 223(a) of the Social Security Act, as amended, 42 U.S.C. §§ 416(i) and 423(a). The Social Security Administration disallowed the application on November 8, 1962, on the ground that appellant was not disabled within the meaning of the law (Exh. 5, A.R. 82-83). Appellant requested reconsideration of this decision (Exh. 7, A.R. 85). On May 13, 1963, he was advised that his case had been reconsidered and his claim again disallowed (Exh. 9, A.R. 87-88). Pursuant to § 205(b) of the Act, 42 U.S.C. § 405(b), appellant sought and obtained review of the adverse decision in the form of a hearing, which was held on February 13 and March 11, 1964, at the District of Columbia Jail.[2] The hearing examiner on May 1, 1964, upheld the action of the Social Security Administration (A.R. 6-13). Appellant's request for further administrative review was denied by the Appeals Council of the Administration (A.R. 2) in the exercise of its discretion under 20 C.F.R. § 404.951.

Appellant began the instant litigation on July 6, 1964, with the filing *pro se* of a "Motion for Summary of Judg-

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[2] Appellant was convicted of robbery in 1962 (Crim. No. 784-61) and sentenced to a prison term of five to fifteen years. On appeal his conviction was reversed and the case remanded for a new trial. *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 316 F.2d 354 (1963). Thereafter appellant entered a plea of guilty to the lesser included offense of attempted robbery and was sentenced on October 11, 1963, to one to three years in prison. In another case involving appellant, Crim. No. 785-61, the indictment was dismissed on motion of the Government on August 17, 1962, following a mistrial several weeks earlier.

In addition, appellant is wanted in Pennsylvania for burglary, larceny, receiving stolen goods and conspiracy. Upon requisition from the Governor of Pennsylvania (Req. No. 18-65), the chief judge of the District Court on October 21, 1965, pursuant to 23 D.C. Code § 401, ordered appellant's rendition to that state. Appellant has challenged that order by means of a petition for a writ of habeas corpus. Leave to appeal *in forma pauperis* from the dismissal of his petition and discharge of the writ after a hearing was granted by the District Court on October 22, 1965. The habeas corpus case is now before this Court as *Mitchell* v. *Clemmer, et al.*, No. 19742.

ment [*sic*]," which the District Court treated as a complaint. Responsive pleadings were filed, including a motion by appellee to dismiss or for summary judgment on March 17, 1965. Appellee's motion was argued on May 25 before Judge Robinson, who took the matter under advisement. On August 31, 1965, an order was entered, accompanied by a memorandum opinion, granting appellee's motion for summary judgment. Leave to appeal *in forma pauperis* was granted by the District Court.

Appellant's claim of disability is based primarily on the fact that he suffers from epilepsy. At the administrative hearing he testified that he had been having epileptic seizures ever since he was nine years old, although they did not become frequent until 1944, when he was twenty-one. It was in that year that he started taking medication for his seizures. Appellant testified, however, that despite the medication he still has seizures "frequently," sometimes two or three times a week (A.R. 33-34). They were continuing while he was in jail. Sometimes he would awaken from a seizure in the jail hospital; on other occasions he would find himself "in bed," presumably in his cell, since he testified that he did not always go to the hospital "because there's nothing that they can do after you get there, no more than give you a shot or something of that nature, give you medicine." He named two nurses formerly at the hospital who knew about his seizures (A.R. 35-36). During a prior term of incarceration in the Virginia State Penitentiary appellant had had seizures and had been given three electroshock treatments (A.R. 36; Exh. 45, A.R. 143). In connection with the criminal charges against him appellant had been committed to Saint Elizabeths Hospital for a mental examination, and during his confinement there he had three seizures. The hospital began to treat him with dilantin and phenobarbital, and the seizures did not recur (A.R. 37; Exh. 48, A.R. 153). The results of psychological tests administered in June 1963 at the hospital were "consistent with a chronic brain syndrome associated with convulsive disorder" (Exh. 51, A.R. 159), and at a medical

staff conference in August 1963 appellant was diagnosed as suffering from "chronic brain syndrome of unknown or unspecified cause, without qualifying phrase"[3] (Exh. 54, A.R. 166). Appellant's report of a silver plate in his head resulting from an earlier injury was not substantiated by X-rays (Exh. 48, A.R. 153).

Appellant testified as to his difficulties in obtaining and holding employment because of his epilepsy. His principal trade was that of a cook, a trade at which he had been working for about twelve years—when not incapaci-

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[3] The diagnosis of chronic brain syndrome was somewhat guarded. Dr. Platkin stated in his report on the medical staff conference:

> [C]linically, although he does present symptoms of chronic brain syndrome, these are not so pronounced as to leave, in at least my mind, the belief that in this patient the chronic brain syndrome is a critical condition. However, all the other members of the conference see this patient as suffering from a chronic brain syndrome. The other senior staff physicians place this on the basis of undetermined etiology. In view, therefore, of the preponderance of opinions in the direction of a chronic brain syndrome, he will be so diagnosed. (Exh. 54, A.R. 165-166)

Dr. Owens wrote:

> It is my general impression that he probably does have grand mal epilepsy, but I also believe that he is attempting to exaggerate this because of his present difficulties. Throughout the examination he related in a spontaneous, coherent, and relevant manner. . . . Psychological examinations in May 1962 and June 1963, suggest findings of a chronic brain syndrome associated with convulsive disorder. Neurological examinations, skull x-ray and two electroencephalograms are normal.
>
> It is my opinion that this patient does not show the disturbance of memory, orientation, judgment, comprehension and affect necessary for a diagnosis of chronic brain syndrome, although he does give a history of idiopathic epilepsy which is fairly well substantiated from other sources, as well as during his previous admission to this hospital. It would therefore be my opinion that this patient has idiopathic epilepsy, but not a chronic brain syndrome associated with it. I would therefore diagnose him as without mental disorder. (Exh. 55, A.R. 167-168)

It should be noted that at a medical staff conference in May 1962, during a previous commitment to Saint Elizabeths, appellant had been diagnosed as without mental disorder (Exh. 49. A.R. 154-155).

tated, that is, by his seizures and by severe headaches from which he also suffered (A.R. 31, 38-39). From 1957 to 1961,[4] according to his wage record (Exh. 13, A.R. 95), he concededly worked fairly steadily (A.R. 32). He was also self-employed as a barber part-time, having learned barbering in Lewisburg Penitentiary (A.R. 32; Exh. 1, A.R. 70). He was no longer permitted to do any barbering work, however, because of his seizures. In the District of Columbia Jail he repaired barber tools and carried them around to the different cell blocks, a steady job at the jail with its 1100-plus inmates (A.R. 39-40). Appellant was pessimistic about his chances of future employment:

> Q. Mr. Mitchell, do you feel if you were discharged from your imprisonment, or at the time of your discharge, you would be unable to work any more?
>
> A. Well, I would because there's no one actually—wants to hire an individual that suffers with seizures.
>
> Q. Why do you say that, Mr. Mitchell? You worked for many years with seizures.
>
> A. I have, I worked for many years.
>
> Q. Why do you feel that nobody would want to hire you?
>
> A. I know when you explain it is a little difficult—to get a job—to explain that you do suffer with seizures. However, there is some that will hire you . . . .
>
> As I explained before, I had seizures and I would work probably sometimes six months out of a year. However, there's times that I could not work because of the fact that it would be so bad until I just couldn't work.
>
> Q. But you did manage to support yourself?
>
> A. Oh, yes, I managed to support myself, but it was —I wasn't working fulltime.

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[4] Appellant was arrested in August 1961 (see, *e.g.*, Exh. 15, A.R. 97; Exh. 48, A.R. 151) and remained in jail thereafter. See footnote 2, *supra*.

Q. Do you feel you'd be able to do it again? Why do you feel you won't be able to do it again?
A. I don't think that I wouldn't be able to do it again, but this is the point, I know if I get out there and begin to work, it would be the same problem because constantly having seizures and going along, you work part of the time, you won't be able to work part of the time, and it's one of those things; you have to be very precautious of.
Q. Would there be any other reason that you could not return to work besides the seizures?
A. No. (A.R. 41-42)

Appellant testified that he would prefer to work rather than to seek a disability payment (A.R. 45). When asked whether there were any type of work he thought he might be able to do, he replied:

> I might be able to try to make hats or something of that nature. I could try; I could find many things, probably, that wouldn't be too strenuous and something that wouldn't cause me to be in a bad position if I did happen to fall out or anything of that nature. I might try to find something. I definitely would try to find something. (A.R. 46)

Dr. Leonard J. Hantsoo, medical officer at the jail, was also called to testify at the hearing.[5] He stated that appellant's epilepsy appeared to be under control with the medication he was receiving, which at the time of the hearing was four capsules daily of dilantin with phenobarbital (A.R. 50-51; see Exh. 46, A.R. 145). The doctor himself had never seen appellant have any seizures, although the medical records to which he referred while testifying indicated that appellant had had two seizures while in jail, the more recent on November 20, 1963 (A.R.

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[5] Appellant himself had originally requested that Dr. Hantsoo be called as a witness. When he was unavailable, the examiner continued the hearing to another date. Appellant thereafter wrote to the hearing examiner indicating that he would waive further hearing, but the examiner decided nevertheless to receive the testimony of Dr. Hantsoo (A.R. 46-48).

51-52). That was his last visit to the jail hospital except for minor ailments and for refills of his epilepsy prescription (A.R. 53). The basis for Dr. Hantsoo's conclusion that the medication adequately controlled appellant's seizures was the fact that the medical records did not indicate that he had had any since his medication had been increased from three to four capsules a day (A.R. 53-55). Appellant himself, recalled briefly to testify, reiterated his earlier assertion that he had seizures in his cell which were not reported to the hospital, although some of the jail guards had seen him (A.R. 57-58). His most recent seizure, which he said was witnessed by two or three other inmates, had occurred only a few days before the hearing (A.R. 60).

In his decision, after reviewing both the testimony and the documentary evidence, the hearing examiner found and concluded (1) that appellant's grand mal epilepsy, of the existence of which "there would appear to be no doubt" (A.R. 8), was "adequately controlled by medication";[6] (2) that "a chronic brain syndrome may exist . . . [but] if it exists it is of very minor extent and does not significantly impair this claimant's ability to engage in gainful employment" (A.R. 12); and (3) that "the mental condition and the epilepsy complained of herein as im-

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[6] With regard to appellant's claim that he had frequent seizures which were not brought to the attention of the medical authorities at the jail, the hearing examiner stated:

> With this particular claimant, there is a serious problem of credibility. It is entirely possible that the claimant did not report certain seizures to the prison physician, or that they were not reported by others. But St. Elizabeths Hospital also reports relatively few typical seizures actually observed, in three periods of commitment. Other institutions report the existence of the disease "by history." It is the conclusion of the Hearing Examiner that the claimant is exaggerating the number and severity of the seizures, and that they are not of such frequency or severity to prevent gainful employment, if the claimant were to be employed. The seizures are adequately controlled by medication and there is no acceptable evidence that they have so increased in number over the time he was employed, to presently disable the claimant. (A.R. 11)

pairments are not of sufficient severity to prevent the claimant from continuing gainful employment" (A.R. 12-13). Accordingly, the hearing examiner's decision was that appellant was not entitled to the establishment of a period of disability or to disability insurance benefits (A.R. 13).

STATUTES INVOLVED

Section 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . .

Section 216(i) of the Social Security Act, as amended, 42 U.S.C. § 416(i), provides in pertinent part:

> (1) Except for purposes of sections 402(d), 423 and 425 of this title, the term "disability" means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or

mental impairment which can be expected to result in death or to be of long-continued and indefinite duration, or (B) blindness; and the term "blindness" means central visual acuity of 5/200 or less in the better eye with the use of a correcting lens. An eye in which the visual field is reduced to five degrees or less concentric contraction shall be considered for the purpose of this paragraph as having a central visual acuity of 5/200 or less. An individual shall not be considered to be under a disability unless he furnishes such proof of the existence thereof as may be required. Nothing in this subchapter shall be construed as authorizing the Secretary or any other officer or employee of the United States to interfere in any way with the practice of medicine or with relationships between practitioners of medicine and their patients, or to exercise any supervision or control over the administration or operation of any hospital.

(2) The term "period of disability" means a continuous period (beginning and ending as hereinafter provided in this subsection) during which an individual was under a disability (as defined in paragraph (1)), but only if such period is of not less than six full calendar months' duration or such individual was entitled to benefits under section 423 of this title for one or more months in such period. No such period shall begin as to any individual unless such individual, while under such disability, files an application for a disability determination with respect to such period . . . .

Section 223(c) (2) of the Social Security Act, as amended, 42 U.S.C. § 423(c) (2), provides:

The term "disability" means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be under a disability unless he furnishes such proof of the existence thereof as may be required.

SUMMARY OF ARGUMENT

The statutory requirement that the administrative findings be supported by substantial evidence has been fully met in this case. The evidence shows that appellant has had only six epileptic seizures since his arrest in August 1961, the last of which occurred in November 1963 at the jail. Increased dosages of medication have prevented their recurrence. The only proof to the contrary is appellant's own uncorroborated testimony, which the hearing examiner, the sole judge of appellant's credibility, declined to accept. The only significant issue before this Court is whether appellant sustained his statutory burden of proof on the issue of disability. Appellee submits that he did not. Appellant established only that he could no longer work as a barber and that his past employment as a cook was somewhat intermittent because of his illness. This is not enough. Appellant must prove that as a consequence of his epilepsy there is no kind of work that a person of his background and qualifications can perform. The record shows, on the contrary, and appellant conceded at the hearing, that he had some degree of success in remaining employed despite his illness during the years preceding his arrest in 1961. Appellant himself stated that he could probably find some kind of work that would not be too strenuous or hazardous to someone with his affliction. He did not offer any acceptable evidence to support his allegation that his seizures had increased to the point that they rendered him unable to engage in any substantial gainful activity. Appellant thus having totally failed to sustain his burden, appellee submits that the findings of the hearing examiner, supported as they are by substantial evidence, were correctly upheld by the court below and should also be affirmed by this Court.

ARGUMENT

Appellant did not sustain his burden of proof on the issue of disability

Two fundamental questions are presented in cases of this sort: first, whether the claimant has sustained his burden of showing that he is in fact suffering from a disability as defined by the statute—"inability to engage in *any substantial* gainful activity by reason of any medically determinable physical or mental impairment," 42 U.S.C. § 423(c)(2) (emphasis added)—and second, whether the findings of the Secretary (or his delegate, the hearing examiner) are "supported by substantial evidence," 42 U.S.C. § 405(g).[7] *Adams* v. *Flemming*, 276 F.2d 901 (2d Cir. 1960). There can be no doubt that the examiner's findings of fact in the case at bar were strongly founded. The evidence was copiously recited by the hearing examiner in his decision (A.R. 6-13), to which appellee respectfully invites the Court's attention. Appellee would merely emphasize that, although the existence of appellant's epileptic condition is undisputed, it is clear from the evidence that it was, as the examiner found, "adequately controlled by medication" (A.R. 11). The record indicates that he had only three seizures at the jail, the last occurring on November 20, 1963, at which time his medication was increased. There are no reported seizures in the record at all thereafter; appellant's testimony as to their continuation and frequency is completely unsubstantiated. The medical reports from Saint Elizabeths Hospital show that appellant's epileptic seizures while in confinement there did not recur after he was given regular doses of dilantin and phenobarbital (see Exh. 48, A.R. 153). The hearing examiner reasonably concluded that appellant was "exaggerating the number and severity" of his seizures and that they would not prevent him from being gainfully employed. See footnote

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[7] The general rules of law applicable here are outlined in *Celebrezze* v. *Bolas*, 316 F.2d 498 (8th Cir. 1963).

6, *supra*. Similarly, there is a rational basis for the examiner's finding that appellant's chronic brain syndrome, if indeed it exists at all—a matter of which there is some doubt; see footnote 3, *supra*—"is of very minor extent, and does not significantly impair [appellant's] ability to engage in gainful employment" (A.R. 12). Substantial evidence is that which "afford[s] a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939) (citations omitted). See generally *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). The evidence here, appellee submits, was more than substantial.[8]

Both the statute, 42 U.S.C. § 423(c)(2), and the applicable case law place on appellant the burden of proof of disability, a burden which he has failed to sustain. It is not enough for appellant to show merely that he may be unable to do the kind of work he formerly did, unless he can also show that there is no other work that a person of his experience and training can perform. Appellee does not have the burden of proving the availability of other employment opportunities. *Jones* v. *Celebrezze*, 331 F.2d 226 (7th Cir. 1964); *Witherspoon* v. *Celebrezze*, 328

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[8] In the cases cited by appellant on this point, either there was no substantial evidence or the evidence of disability was quite strong. For example, in *Blevins* v. *Flemming*, 180 F. Supp. 287 (W.D. Ark. 1960), the claimant offered testimony from physicians that she was unable to work at a regular job and required constant supervision when performing domestic duties around the home. In *Wells* v. *Celebrezze*, 209 F. Supp. 444 (W.D.N.C. 1962), there was strong evidence of the claimant's inability to hold any regular job since the age of fourteen. In *Celebrezze* v. *Warren*, 339 F.2d 833 (10th Cir. 1964), the applicant's evidence of disability was uncontradicted, and the court held accordingly that the Secretary's adverse determination was not based on substantial evidence. Only where there is *no* substantial evidence from which the Secretary could have made his finding can that finding, whatever it may be, be overturned in the courts. *Clinch* v. *Celebrezze*, 328 F.2d 778 (5th Cir. 1964).

F.2d 311 (5th Cir. 1964); *Gotshaw* v. *Ribicoff*, 307 F.2d 840 (4th Cir. 1962); *Graham* v. *Ribicoff*, 295 F.2d 391 (9th Cir. 1961); *Adams* v. *Flemming*, *supra*. There are many other trades which appellant could follow other than cooking and barbering. He could, for example, repair barber tools, a task which he performs in jail with apparent success. Appellant himself suggested the possibility of making hats. At least, he stated, he would make a determined effort to find employment: "I could try; I could find many things, probably, that wouldn't be too strenuous and something that wouldn't cause me to be in a bad position if I did happen to fall out or anything of that nature" (A.R. 46). Appellant, in short, did not establish any inability to obtain and hold employment. On the contrary, the record shows (Exh. 13, A.R. 95)—and appellant conceded (A.R. 32)—that he has been fairly successful in the past in maintaining an employed status despite his illness. He ceased to be regularly employed, of course, when he was arrested in August 1961, and coincidentally it is from that date that he now asserts he has been unable to work because of his epilepsy (Exh. 1, A.R. 69). There is evidence of only six seizures since his arrest, three in jail and three in Saint Elizabeths. At each institution the seizures stopped when adequate medication was given. Appellant, of course, testified that the seizures continued at the rate of two or three a month[9] (A.R. 58) but offered no additional evidence to corroborate his testimony, not even the names of the other inmates or guards who allegedly saw him in his distress.[10]

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[9] This testimony is contradicted by appellant's own statement to a field representative of the Social Security Administration, who interviewed him at the jail in September 1962, that he had not had a seizure for three or four months, since before he returned to jail from Saint Elizabeths in June (Exh. 15, A.R. 97).

[10] It was incumbent upon appellant to overcome the effect of the absence of such proof. *Carqueville* v. *Flemming*, 263 F.2d 875 (7th Cir. 1959). He did not do so; but even if he had, the evidence of the lack of seizures would have remained in the case and would have provided sufficient basis for the administrative findings. *Lemley* v. *Celebrezze*, 331 F.2d 296 (5th Cir. 1964); *Celebrezze* v. *Bolas*, *supra*.

The hearing examiner, weighing appellant's credibility [11] against the documentary evidence from Saint Elizabeths and elsewhere, resolved the factual issue against appellant and found "no acceptable evidence" that his seizures had increased in number and frequency so as to give rise to a disability under the Social Security Act.

One apparent problem remains. It has been held that an administrative determination of whether an applicant for disability benefits is unable to engage in any substantial gainful activity "requires resolution of two issues—what can applicant do, and what employment opportunities are there for a man who can do only what applicant can do?" *Kerner* v. *Flemming*, 283 F.2d 916, 921 (2d Cir. 1960). Appellant suggests that the hearing examiner or the court below, or both, should have made findings on these issues. Appellee disagrees. The *Kerner* opinion limits the necessity of findings on these two points to situations "where the applicant has raised a serious question and the evidence affords *no sufficient basis* for the Secretary's negative answer." *Id.* at 922 (emphasis added). Such is not the case here. It cannot be said that this administrative record provides "no sufficient basis" for appellee's rejection of appellant's claim. Compare *Kerner*, *supra*, with *Stoliaroff* v. *Ribicoff*, 198 F. Supp. 587 (N.D. N.Y. 1961).

In brief, appellee submits that appellant has failed to carry his burden of proving either that he was afflicted with uncontrolled or uncontrollable grand mal epilepsy or that he was thereby rendered unable "to engage in any substantial gainful activity." The findings of the hearing examiner, appellee's authorized delegate, are supported by substantial evidence and should be upheld by this Court.

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[11] Appellant by his own admission was a "chronic liar." See A.R. 9; Exh. 47, A.R. 149; Exh. 48, A.R. 150-151; Exh. 53, A.R. 163.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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2/ Appellant was convicted of robbery in 1962 (Crim. No. 784-61) and sentenced to a prison term of five to fifteen years. On appeal his conviction was reversed and the case remanded for a new trial. Mitchell v. United States, 114 U.S. App. D.C. 353, 316 F.2d 354 (1963). Thereafter appellant entered a plea of guilty of the lesser included offense of attempted robbery and was sentenced on October 11, 1963, to one to three years in prison. In another case involving appellant, Crim. No. 785-61, the indictment was dismissed on motion of the Government on August 17, 1962, following a mistrial several weeks earlier.

In addition, appellant is wanted in Pennsylvania for burglary, larceny, receiving stolen goods and conspiracy. Upon requisition from the Governor of Pennsylvania (Req. No. 18-65), the chief judge of the District Court on October 21, 1965, pursuant to 23 D.C. Code § 401, ordered appellant's rendition to that state. Appellant has challenged that order by means of a petition for a writ of habeas corpus. Leave to appeal in forma pauperis from the dismissal of his petition and discharge of the writ after a hearing was granted by the District Court on October 22, 1965. The habeas corpus case is now before this Court as Mitchell v. Clemmer, et al., No. 19742.

Appellant began the instant litigation on July 6, 1964, with the filing pro se of a "Motion for Summary of Judgment [sic]," which the District Court treated as a complaint. Responsive pleadings were filed, including a motion by appellee to dismiss or for summary judgment on March 17, 1965. Appellee's motion was argued on May 25 before Judge Robinson, who took the matter under advisement. On August 31, 1965, an order was entered, accompanied by a memorandum opinion, granting appellee's motion for summary judgment. Leave to appeal in forma pauperis was granted by the District Court.

Appellant's claim of disability is based primarily on the fact that he suffers from epilepsy. At the administrative hearing he testified that he had been having epileptic seizures ever since he was nine years old, although they did not become frequent until 1944, when he was twenty-one. It was in that year that he started taking medication for his seizures. Appellant testified, however, that despite the medication he still has seizures "frequently," sometimes two or three times a week (A.R. 33-34). They were continuing while he was in jail. Sometimes he would awaken from a seizure in the jail hospital; on other occasions he would find himself "in bed," presumably in his cell, since he testified that he did not always go to the hospital "because there's nothing that they can do after you get there, no more than give you a shot or something of that nature, give you medicine." He named two nurses formerly at the hospital who knew about his seizures (A.R. 35-36). During a prior term of incarceration in the Virginia State Penitentiary appellant had had seizures and had been given three electroshock treatments (A.R. 36; Exh. 45, A.R. 143). In connection with the criminal charges against him appellant had been committed to Saint Elizabeths Hospital for a mental examination, and during his confinement there he had three seizures. The hospital began to

treat him with dilantin and phenobarbital, and the seizures did not recur (A.R. 37; Exh. 48, A.R. 153). The results of psychological tests administered in June 1963 at the hospital were "consistent with a chronic brain syndrome associated with convulsive disorder" (Exh. 51, A.R. 159), and at a medical staff conference in August 1963 appellant was diagnosed as suffering from "chronic brain syndrome of unknown or unspecified cause, without qualifying phrase"[3/] (Exh. 54, A.R. 166). Appellant's report of a silver plate in his head resulting from an earlier injury was not substantiated by X-rays (Exh. 48, A.R. 153).

3/ The diagnosis of chronic brain syndrome was somewhat guarded. Dr. Platkin stated in his report on the medical staff conference:

> [C]linically, although he does present symptoms of chronic brain syndrome, these are not so pronounced as to leave, in at least my mind, the belief that in this patient the chronic brain syndrome is a critical condition. However, all the other members of the conference see this patient as suffering from a chronic brain syndrome. The other senior staff physicians place this on the basis of undetermined etiology. In view, therefore, of the preponderance of opinions in the direction of a chronic brain syndrome, he will be so diagnosed. (Exh. 54, A.R. 165-166)

Dr. Owens wrote:

> It is my general impression that he probably does have grand mal epilepsy, but I also believe that he is attempting to exaggerate this because of his present difficulties. Throughout the examination he related in a spontaneous, coherent, and relevant manner. . . . Psychological examinations in May 1962 and June 1963, suggest findings of a chronic brain syndrome associated with convulsive disorder. Neurological examinations, skull x-ray and two electroencephalograms are normal.
>
> It is my opinion that this patient does not show the disturbance of memory, orientation, judgment, comprehension and affect necessary for a diagnosis of chronic brain syndrome, although he does give a history of idiopathic epilepsy which is fairly well substantiated from other sources, as well as during his previous admission to this hospital. It would therefore be my opinion that this patient has idiopathic epilepsy, but not a chronic brain syndrome associated with it. I would therefore diagnose him as without mental disorder. (Exh. 55, A.R. 167-168)

(footnote 3 continued next page)

Appellant testified as to his difficulties in obtaining and holding employment because of his epilepsy. His principal trade was that of a cook, a trade at which he had been working for about twelve years---when not incapacitated, that is, by his seizures and by severe headaches from which he also suffered (A.R. 31, 38-39). From 1957 to 1961,[4] according to his wage record (Exh. 13, A.R. 95), he concededly worked fairly steadily (A.R. 32). He was also self-employed as a barber part-time, having learned barbering in Lewisburg Penitentiary (A.R. 32; Exh. 1, A.R. 70). He was no longer permitted to do any barbering work, however, because of his seizures. In the District of Columbia Jail he repaired barber tools and carried them around to the different cell blocks, a steady job at the jail with its 1100-plus inmates (A.R. 39-40). Appellant was pessimistic about his chances of future employment:

> Q. Mr. Mitchell, do you feel if you were discharged from your imprisonment, or at the time of your discharge, you would be unable to work any more?
>
> A. Well, I would because there's no one actually --- wants to hire an individual that suffers with seizures.
>
> Q. Why do you say that, Mr. Mitchell? You worked for many years with seizures.
>
> A. I have, I worked for many years.
>
> Q. Why do you feel that nobody would want to hire you?

(footnote 3 continued from preceding page)

It should be noted that at a medical staff conference in May 1962, during a previous commitment to Saint Elizabeths, appellant had been diagnosed as without mental disorder (Exh. 49, A.R. 154-155).

4/ Appellant was arrested in August 1961 (see, e.g., Exh. 15, A.R. 97; Exh. 48, A.R. 151) and remained in jail thereafter. See footnote 2, supra.

A. I know when you explain it is a little difficult --- to get a job --- to explain that you do suffer with seizures. However, there is some that will hire you . . . .

As I explained before, I had seizures and I would work probably sometimes six months out of a year. However, there's times that I could not work because of the fact that it would be so bad until I just couldn't work.

Q. But you did manage to support yourself?

A. Oh, yes, I managed to support myself, but it was --- I wasn't working fulltime.

Q. Do you feel you'd be able to do it again? Why do you feel you won't be able to do it again?

A. I don't think that I wouldn't be able to do it again, but this is the point, I know if I get out there and begin to work, it would be the same problem because constantly having seizures and going along, you work part of the time, you won't be able to work part of the time, and it's one of those things; you have to be very precautious of.

Q. Would there be any other reason that you could not return to work besides the seizures?

A. No. (A.R. 41-42)

Appellant testified that he would prefer to work rather than to seek a disability payment (A.R. 45). When asked whether there were any type of work he thought he might be able to do, he replied:

> I might be able to try to make hats or something of that nature. I could try; I could find many things, probably, that wouldn't be too strenuous and something that wouldn't cause me to be in a bad position if I did happen to fall out or anything of that nature. I might try to find something. I definitely would try to find something. (A.R. 46)

Dr. Leonard J. Hantsoo, medical officer at the jail, was also called to testify at the hearing.[5/] He stated that appellant's epilepsy appeared to be

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5/ Appellant himself had originally requested that Dr. Hantsoo be called as a witness. When he was unavailable, the examiner continued the hearing to another date. Appellant thereafter wrote to the hearing examiner indicating that he would waive further hearing, but the examiner decided nevertheless to receive the testimony of Dr. Hantsoo (A.R. 46-48).

under control with the medication he was receiving, which at the time of the hearing was four capsules daily of dilantin with phenobarbital (A.R. 50-51; see Exh. 46, A.R. 145). The doctor himself had never seen appellant have any seizures, although the medical records to which he referred while testifying indicated that appellant had had two seizures while in jail, the more recent on November 20, 1963 (A.R. 51-52). That was his last visit to the jail hospital except for minor ailments and for refills of his epilepsy prescription (A.R. 53). The basis for Dr. Hantsoo's conclusion that the medication adequately controlled appellant's seizures was the fact that the medical records did not indicate that he had had any since his medication had been increased from three to four capsules a day (A.R. 53-55). Appellant himself, recalled briefly to testify, reiterated his earlier assertion that he had seizures in his cell which were not reported to the hospital, although some of the jail guards had seen him (A.R. 57-58). His most recent seizure, which he said was witnessed by two or three other inmates, had occurred only a few days before the hearing (A.R. 60).

In his decision, after reviewing both the testimony and the documentary evidence, the hearing examiner found and concluded (1) that appellant's grand mal epilepsy, of the existence of which "there would appear to be no doubt" (A.R. 8), was "adequately controlled by medication"[6]; (2) that "a chronic

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6/ With regard to appellant's claim that he had frequent seizures which were not brought to the attention of the medical authorities at the jail, the hearing examiner stated:

> With this particular claimant, there is a serious problem of credibility. It is entirely possible that the claimant did not report certain seizures to the prison physician, or that they were not reported by others. But St. Elizabeths Hospital also reports relatively few typical seizures actually observed,

(footnote 6 continued next page)

brain syndrome may exist. . . [but] if it exists it is of very minor extent and does not significantly impair this claimant's ability to engage in gainful employment"(A.R. 12); and (3) that "the mental condition and the epilepsy complained of herein as impairments are not of sufficient severity to prevent the claimant from continuing gainful employment" (A.R. 12-13). Accordingly, the hearing examiner's decision was that appellant was not entitled to the establishment of a period of disability or to disability insurance benefits (A.R. 13).

(footnote 6 continued from preceding page)

in three periods of commitment. Other institutions report the existence of the disease "by history." It is the conclusions of the Hearing Examiner that the claimant is exaggerating the number and severity of the seizures, and that they are not of such frequency or severity to prevent gainful employment, if the claimant were to be employed. The seizures are adequately controlled by medication and there is no acceptable evidence that they have so increased in number over the time he was employed, to presently disable the claimant.

STATUTES INVOLVED

Section 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . .

Section 216(i) (2) of the Social Security Act, as amended, 42 U.S.C. § 416(i) (2), provides in pertinent part:

> (1) Except for purposes of sections 402(d), 423 and 425 of this title, the term "disability" means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration, or (B) blindness; and the term "blindness" means central visual acuity of 5/200 or less in the better eye with the use of a correcting lens. An eye in which the visual field is reduced to five degrees or less concentric contraction shall be considered for the purpose of this paragraph as having a central visual acuity of 5/200 or less. An individual shall not be considered to be under a disability unless he furnishes such proof of the existence thereof as may be required. Nothing in this subchapter shall be construed as authorizing the Secretary or any other officer or employee of the United States to interfere in any way with the practice of medicine or with relationships betwee

practitioners of medicine and their patients, or to exercise any supervision or control over the administration or operation of any hospital.

(2) The term "period disability" means a continuous period (beginning and ending as hereinafter provided in this subsection) during which an individual was under a disability (as defined in paragraph (1)), but only if such period is of not less than six full calendar months' duration or such individual was entitled to benefits under section 423 of this title for one or more months in such period. No such period shall begin as to any individual unless such individual, while under such disability, files an application for a disability determination with respect to such period. . . .

Section 223(c) (2) of the Social Security Act, as amended, 42 U.S.C. § 423(c) (2), provides:

The term "disability" means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be under a disability unless he furnishes such proof of the existence thereof as may be required.

SUMMARY OF ARGUMENT

The statutory requirement that the administrative findings be supported by substantial evidence has been fully met in this case. The evidence shows that appellant has had only six epileptic seizures since his arrest in August 1961, the last of which occurred in November 1963 at the jail. Increased dosages of medication have prevented their recurrence. The only proof to the contrary is appellant's own uncorroborated testimony, which the hearing examiner, the sole judge of appellant's credibility, declined to accept. The only significant issue before this Court is whether appellant sustained his statutory burden of proof on the issue of disability. Appellee submits that he did not. Appellant established only that he could no longer work as a barber and that his past employment as a cook was somewhat intermittent because of his illness. This is not enough. Appellant must prove that as a consequence of his epilepsy there is no kind of work that a person of his background and qualifications can perform. The record shows, on the contrary, and appellant conceded at the hearing, that he has had some degree of success in remaining employed despite his illness during the years preceding his arrest in 1961. Appellant himself stated that he could probably find some kind of work that would not be too strenuous or hazardous to someone with his affliction. He did not even offer any acceptable evidence to support his allegation that his seizures had increased to the point that they rendered him unable to engage in any substantial gainful activity. Appellant thus having totally failed to sustain his burden, appellee submits that the findings of the hearing examiner, supported as they are by substantial evidence, were correctly upheld by the court below and should also be affirmed by this Court.

ARGUMENT

Appellant did not sustain his burden of proof on the issue of disability.

Two fundamental questions are presented in cases of this sort: first, whether the claimant has sustained his burden of showing that he is in fact suffering from a disability as defined by the statute---"inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment," 42 U.S.C. § 423(c) (2) (emphasis added)---and second, whether the findings of the Secretary (or his delegate, the hearing examiner) are "supported by substantial evidence," 42 U.S.C. § 405(g).[7] Adams v. Flemming, 276 F.2d 901 (2d Cir. 1960). There can be no doubt that the examiner's findings of fact in the case at bar were strongly founded. The evidence was copiously recited by the hearing examiner in his decision (A.R. 6-13), to which appellee respectfully invites the Court's attention. Appellee would merely emphasize that, although the existence of appellant's epileptic condition is undisputed, it is clear from the evidence that it was, as the examiner found, "adequately controlled by medication" (A.R. 11). The record indicates that he had only three seizures at the jail, the last occurring on November 20, 1963, at which time his medication was increased. There are no reported seizures in the record at all thereafter; appellant's testimony as to their continuation and frequency is completely unsubstantiated. The medical reports from Saint Elizabeths Hospital show that appellant's epileptic seizures while in confinement there did not recur after he was given regular doses of dilantin and phenobarbital (see Exh. 48, A.R. 153). The hearing examiner reasonably

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7/ The general rules of law applicable here are outlined in Celebrezze v. Bolas, 316 F.2d 498 (8th Cir. 1963).

concluded that appellant was "exaggerating the number and severity" of his seizures and that they would not prevent him from being gainfully employed. See footnote 6, supra. Similarly, there is a rational basis for the examiner's finding that appellant's chronic brain syndrome, if indeed it exists at all---a matter of which there is some doubt; see footnote 3, supra---"is of very minor extent, and does not significantly impair [appellant's] ability to engage in gainful employment" (A.R. 12). Substantial evidence is that which "afford[s] a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 299-300 (1939) (citations omitted). See generally Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The evidence here, appellee submits, was more than substantial.[8/]

Both the statute, 42 U.S.C. § 423(c)(2), and the applicable case law place on appellant the burden of proof of disability, a burden which he has failed to sustain. It is not enough for appellant to show merely that he may be unable to do the kind of work he formerly did, unless he can also show that

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8/ In the cases cited by appellant on this point, either there was no substantial evidence or the evidence of disability was quite strong. For example, in Blevins v. Fleming, 180 F. Supp. 287 (W.D. Ark. 1960), the claimant offered testimony from physicians that she was unable to work at a regular job and required constant supervision when performing domestic duties around the home. In Wells v. Celebrezze, 209 F. Supp. 444 (W.D.N.C. 1962), there was strong evidence of the claimant's inability to hold any regular job since the age of fourteen. In Warren v. Celebrezze, 339 F.2d 833 (10th Cir. 1964), the applicant's evidence of disability was uncontradicted, and the court held accordingly that the Secretary's adverse determination was not based on substantial evidence. Only where there is no substantial evidence from which the Secretary could have made his finding can that finding, whatever it may be, be overturned in the courts. Clinch v. Celebrezze, 328 F.2d 778 (5th Cir. 1964).

there is no other work that a person of his experience and training can perform. Appellee does not have the burden of proving the availability of other employment opportunities. Jones v. Celebrezze, 331 F.2d 226 (7th Cir. 1964); Witherspoon v. Celebrezze, 328 F.2d 311 (5th Cir. 1964); Gotshaw v. Ribicoff, 307 F.2d 840 (4th Cir. 1962); Graham v. Ribicoff, 295 F.2d 391 (9th Cir. 1961); Adams v. Flemming, supra. There are many other trades which appellant could follow other than cooking and barbering. He could, for example, repair barber tools, a task which he performs in jail with apparent success. Appellant himself suggested the possibility of making hats. At least, he stated, he would make a determined effort to find employment: "I could try; I could find many things, probably, that wouldn't be too strenuous and something that wouldn't cause me to be in a bad position if I did happen to fall out or anything of that nature" (A.R. 46). Appellant, in short, did not establish any inability to obtain and hold employment. On the contrary, the record shows (Exh. 13, A.R. 95) ---and appellant conceded (A.R. 32)---that he has been fairly successful in the past in maintaining an employed status despite his illness. He ceased to be regularly employed, of course, when he was arrested in August 1961, and coincidentally it is from that date that he now asserts he has been unable to work because of his epilepsy (Exh. 1, A.R. 69). There is evidence of only six seizures since his arrest, three in jail and three in Saint Elizabeths. At each institution the seizures stopped when adequate medication was given. Appellant, of course, testified that the seizures continued at the rate of two or three a month[9/] (A.R. 58) but offered no additional

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9/ This testimony is contradicted by appellant's own statement to a field representative of the Social Security Administration, who interviewed him at the jail in September 1962, that he had not had a seizure for three or four months, since before he returned to jail from Saint Elizabeths in June (Exh. 15, A.R. 97).

evidence to corroborate his testimony, not even the names of the other inmates or guards who allegedly saw him in his distress.[10] The hearing examiner, weighing appellant's credibility[11] against the documentary evidence from Saint Elizabeths and elsewhere, resolved the factual issue against appellant and found "no acceptable evidence" that his seizures had increased in number and frequency so as to give rise to a disability under the Social Security Act.

One apparent problem remains. It has been held that an administrative determination of whether an applicant for disability benefits is unable to engage in any substantial gainful activity "requires resolution of two issues---what can applicant do, and what employment opportunities are there for a man who can do only what applicant can do?" Kerner v. Flemming, 283 F.2d 916, 921 (2d Cir. 1960). Appellant suggests that the hearing examiner or the court below, or both, should have made findings on these issues. Appellee disagrees. The Kerner opinion limits the necessity of findings on these two points to situations "where the applicant has raised a serious question and the evidence affords no sufficient basis for the Secretary's negative answer." Id. at 922 (emphasis added). Such is not the case here.

10/ It was incumbent upon appellant to overcome the effect of the absence of such proof. Carqueville v. Flemming, 263 F.2d 875 (7th Cir. 1959) He did not do so; but even if he had, the evidence of the lack of seizures would have remained in the case and would have provided sufficient basis for the administrative findings. Lemley v. Celebrezze, 331 F.2d 296 (5th Cir. 1964); Celebrezze v. Bolas, supra.

11/ Appellant by his own admission was a "chronic liar." See A.R. 9; Exh. 47, A.R. 149; Exh. 48, A.R. 150-151; Exh. 53, A.R. 163.

It cannot be said that this administrative record provides "no sufficient basis" for appellee's rejection of appellant's claim. Compare Kerner, supra, with Stoliaroff v. Ribicoff, 198 F. Supp. 587 (N.D.N.Y. 1961).

In brief, appellee submits that appellant has failed to carry his burden of proving either that he was afflicted with uncontrolled or uncontrollable grand mal epilepsy or that he was thereby rendered unable "to engage in any substantial gainful activity." The findings of the hearing examiner, appellee's authorized delegate, are supported by substantial evidence and should be upheld by this Court.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellee has been personally served on attorneys for appellant, Charles H. Kendall, Esq., and T. T. Marye, Esq., Legal Aid Society, 805 G Street, N. W., Washington, D. C., 20001, this 8th day of December, 1965.

/s/ JOHN A. TERRY
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